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No. 06-

IN THE
Supreme Court of the United States

ALBIN C. BRENKUS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Petitioner's conviction for obstruction of justice under 18 U.S.C. § 1503 must be reversed because the Seventh Circuit, in conflict with this Court's prior decision in *United States v. Aguilar*, 515 U.S. 593 (1995) and the majority of federal circuits, incorrectly concluded that a defendant can be convicted of obstruction of justice under 18 U.S.C. § 1503 even though he lacked knowledge that his actions were likely to affect a judicial proceeding.

LIST OF PARTIES

Peter R. Macari and Albin C. Brenkus were Defendants-Appellants and the United States was Plaintiff-Appellee in the proceedings in the United States Court of Appeals for the Seventh Circuit. This petition seeks review of only the judgment entered against Petitioner Brenkus.

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PETITION FOR A WRIT OF CERTIORARI

Albin C. Brenkus respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is available at *United States v. Macari*, 453 F.3d 926 (7th Cir. 2006), and is reprinted at App. 1-34. With respect to Petitioner, the court of appeals affirmed the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, which is unreported but reprinted at App. 35-59.

JURISDICTIONAL STATEMENT

The Seventh Circuit affirmed the district court's judgment on July 14, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

APPLICABLE STATUTES

The complete text of 18 U.S.C. § 1503 is reprinted at App. 64-65.

STATEMENT OF THE CASE

On November 6, 2003, the government charged Albin C. Brenkus ("Brenkus") and eight other members or prospective members of the Motion Picture Projectionists, Operators and Video Technicians, Local 110 of the International Alliance of Theatrical Stage Employees of the United States and Canada,

AFL-CIO ("Local 110") in a fourteen count indictment. Brenkus, the secretary and treasurer of Local 110, was charged with thirteen arson-related offenses arising from an alleged conspiracy to coerce movie theater companies to enter into collective bargaining agreements with Local 110. (R. 1, at 1-29).[1]

The government also charged Brenkus in count fourteen with corruptly endeavoring to influence, obstruct, and impede the due administration of justice in violation of 18 U.S.C. § 1503. The indictment charged that Brenkus violated § 1503 on October 22, 2001 by directing and advising Joseph Marjan, a fellow member of Local 110, to falsely deny to a federal grand jury that he (Marjan) had participated in acts of vandalism and arson and knew the identities of other Local 110 members or associates that had engaged in acts of arson, vandalism, and violence. (R. 1, at 30-32).

On March 5, 2004, a jury acquitted Brenkus of all counts relating to his alleged participation in the arson scheme, but nevertheless found Brenkus guilty of obstructing justice. At sentencing, utilizing additional conduct arising out of the same conspiracy of which Brenkus had been acquitted, the district court increased by nearly five times the maximum sentence Brenkus was facing under the Federal Sentencing Guidelines. The court then sentenced Brenkus to the maximum sentence available under those

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[1] Citations to "R." refer to the record filed in the Seventh Circuit. Citations to "Tr." refer to the trial transcript in the district court. Citations to "Sent. Tr." refer to the sentencing transcript in the district court.

guidelines, 78 months in prison. As a result, Brenkus received the longest sentence of any defendant in this case, even longer than the six co-defendants who pled guilty to the arson charges for which Brenkus was acquitted.

A. The District Court Proceedings

1. The Alleged Arson Scheme

The government charged that the defendants conspired to place incendiary devices in movie theaters across the country in order to pressure theaters to enter into collective bargaining agreements with Local 110. (R. 1, at 1-29). The alleged incendiary devices consisted of a mixture of commercially available chlorine tablets and brake fluid, which were most often combined in a movie theater soda cup. (Tr. 71, 96). When the chlorine and brake fluid were mixed together, a chemical reaction occurred and produced, after several minutes, a cloud of smoke and occasionally a flame. (Tr. 71, 221).

Like picketing and other forms of vandalism employed by Local 110 to induce the theaters to enter into agreements with the union, the chlorine devices were intended to disrupt the movie theater companies' operations and cause economic damage to the companies, who threatened to reduce union wages by as much as 80%. (Tr. 216, 227-28, 232-33, 337). Although the chlorine devices did occasionally transition to flame, the devices were not intended to cause fire, burn theaters, or burn theater property. (Tr. 221, 226, 337-38, 408-09). The individuals who placed the chlorine devices in theaters testified that

they made a number of changes to the devices to reduce the risk that they would cause a fire. (Tr. 225, 409-10).

2. The Alleged Obstruction of a Grand Jury Proceeding

In August 1999, the government issued a subpoena to Local 110 requesting "records, lists of names, phone numbers, rosters, things of that nature," (Tr. 294) but the government presented no evidence at trial that it had conducted any further investigation during the remainder of 1999 or 2000 regarding the involvement of Local 110 members in the alleged arson scheme. In March 2001, FBI agents contacted Joe Marjan, a member of Local 110 who was involved in placing several of the chlorine devices in theaters, and Marjan began cooperating with the FBI at that time. (Tr. 395). While cooperating with the government over the next three years, Marjan met with the government on more than twenty occasions, (Tr. 436-37), but there was no evidence that Marjan—or any other witness in the Local 110 investigation—testified before a grand jury prior to May 2002.

Joe Marjan had been a member of Local 110 since 1998, and he had developed a close relationship with Brenkus. (*See* Tr. 414-17). On October 22, 2001, Marjan went to the offices of Local 110 to meet with Brenkus with the supposed purpose of discussing Power Point training for Local 110 members. (Tr. 396). Most of the conversation between Marjan and Brenkus, which was recorded by Marjan, addressed this training. (Tr. 396-97). Well into the conversa-

tion, however, Marjan changed the subject by asking Brenkus to go downstairs "for a Coke or candy bar," and he and Brenkus then exited the Local 110 offices. (Tr. 396, 424).

While in a utility room in a floor below the union's offices, Marjan made several statements to Brenkus in an attempt to elicit incriminating information from him. (Tr. 402-04). For instance, on the tape of the recorded conversation, Marjan is heard *falsely* telling Brenkus that he talked to an individual named Scott Fagen, "And he's just tellin' me, you know, that Covelli was involved in the Grand Jury and Covelli got, you know, he's the second person this month." (R. 223 (Gov't Ex. 54); Tr. 402). In fact, Marjan had not had this conversation with Fagen, and Covelli *had not received a grand jury subpoena.*[2] Marjan then sta d "I'm scared" and asked Brenkus "should I be scared?" (R. 223 (Gov't Ex. 54)).

Brenkus responded by telling Marjan that he should not be scared because "You don't know nothin'" and "you don't know what they're talking

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[2] At the sentencing hearing, it was established that Covelli was first approached by law enforcement in October 1999, and he provided several false statements at that time. (Sent. Tr. 42). Covelli did not begin cooperating with the government, however, until February 2004. (Sent. Tr. 59-60). Despite the fact that Covelli was listed as a government witness for trial, and testified at sentencing, the government never provided Brenkus with any documents indicating that Covelli was ever subpoenaed to testify or testified before a grand jury.

about." (R. 223 (Gov't Ex. 54)).[3] Marjan testified that he understood Brenkus to be instructing him that "if anyone came to me, any *law enforcement* came to me that I tell them that I don't know nothing" and that if "I was asked by the law *enforcement*, that I didn't train anybody." (Tr. 403-04) (emphasis added). Marjan did not testify that he received a subpoena, testified before the grand jury, or that, at the time of his October 22, 2001 conversation with Brenkus, he anticipated being a witness before a grand jury.

Following the October 22, 2001 conversation between Marjan and Brenkus, the government issued subpoenas to Kent Dickinson, another member of Local 110, and Brenkus. (Tr. 205-06, 212). Dickinson testified that he was approached by the government on October 27, 2001 and presented with a grand jury subpoena. (Tr. 205-06). The following day, Dickinson called Brenkus and informed him that he had re-

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[3] The government initially claimed that Brenkus told Marjan that "I think you should say you don't know nothin'" and told him to "just play stupid. Just play stupid[.]" (Tr. 403; R. 223 (Gov't Ex. 54)). At trial, however, Brenkus introduced an enhanced tape of the conversation which had been provided to the defense by the government. (R. 223 (Brenkus Ex. 3)). According to defense witness Maria Ovalle, who transcribed the enhanced tape after listening to the conversation approximately 20 times, Brenkus did not say "I think you should say . . ." and did not say "just play stupid," as Marjan stated and the government alleged. (Tr. 931-32). The government essentially conceded during its closing argument that its transcribed version of the recorded conversation was inaccurate. (Tr. 1025).

ceived a subpoena. (Tr. 210-12).[4] At a subsequent meeting arranged to discuss the subpoena, Brenkus informed Dickinson that he too had received a subpoena. (Tr. 212).

The government presented no evidence that any subpoenas were issued to Local 110 members or other individuals involved in the alleged arson scheme prior to the recorded conversation between Marjan and Brenkus on October 22, 2001. The grand jury that indicted Brenkus was not convened until February 2002, more than three months after the alleged obstruction. (R. 1) (charges brought by Special February 2002-2 Grand Jury).

3. The Verdict and Sentencing

At the end of the government's case, the district court granted judgment of acquittal to Brenkus and Tortorello on one of the arson-related counts. (Tr. 877-913, 918-19; R. 163). The remainder of the case was submitted to the jury.

With respect to count fourteen, the count charging obstruction of justice, Brenkus submitted jury instructions modeled after this Court's decision in *United States v. Aguilar*, 515 U.S. 593 (1995), which would have required the jury to find that Brenkus expected Marjan "to be called to testify in a

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[4] Brenkus objected to this testimony, but the district court overruled the objection based on the government's representation that it would not argue that this conversation had "any bearing at all on the obstruction count." (Tr. 210).

pending judicial proceeding or grand jury investigation." (R. 161, Brenkus Instr. Nos. 37, 38). The district court refused that instruction, concluding that it was not applicable to the charge in this case. (Tr. 978). As a result of the district court's ruling on this issue, the jury was never instructed that it had to determine that Brenkus expected Marjan to be a witness before the grand jury or some other judicial proceeding.

The jury rejected the government's theory that Brenkus committed arson, or conspired to do so. The jury acquitted Brenkus of each of the thirteen arson-related counts, but convicted him of obstruction of justice under 18 U.S.C. § 1503. (R. 166).

At sentencing, Brenkus faced an initial sentencing range under the Guidelines of 10-16 months on the charged obstruction count. Relying on additional conduct arising out of the arson conspiracy of which Brenkus had been acquitted, the Court increased his sentencing range under the Guidelines to 63-78 months. The Court then imposed the maximum sentence of 78 months in the custody of the Bureau of Prisons, and also imposed a $100,000 fine. (Sent. Tr. 113).

B. The Appeal

Brenkus appealed his conviction to the U.S. Court of Appeals for the Seventh Circuit, arguing that that the government failed to prove two of the necessary elements of the charged obstruction offense. First, Brenkus argued that the government

failed to prove there was a pending judicial proceeding at the time of the alleged obstruction.

Second, Brenkus argued the government failed to prove that he intended to influence a judicial proceeding because it failed to establish, as required by this Court's decision in *Aguilar*, 515 U.S. at 599, that he knew that his actions had the "natural and probable effect" of obstructing or interfering with a grand jury proceeding. Because of the district court's erroneous jury instructions, the jury was never required to consider this critical element of the charged obstruction offense, and, to date, no jury or court has ever considered whether the government established that Brenkus expected Marjan to be a witness before the grand jury.

The Seventh Circuit affirmed Brenkus's conviction, reasoning that a jury could have concluded that Brenkus made the statements to Marjan with the intention of obstructing the grand jury's investigation "because there was a logical relationship between his knowing conduct—directing Marjan to fabricate—and the effect it was likely to have—keeping information from reaching the grand jury." (App. at 29). In rejecting Brenkus's challenge to the district court's refusal to instruct the jury in accordance with this Court's prior decision in *Aguilar*, the Seventh Circuit again made clear that, in its view, a defendant need only have engaged in knowing or intentional conduct and need not have been aware of the likely consequences of his conduct:

> [T]o prove that Brenkus obstructed justice, the government was required to show that

> Brenkus intended to engage in conduct that would have had the "natural and probable" effect of impending the administration of the grand jury proceeding. Directing even a potential witness to lie directly to the grand jury could very easily have had the "natural and probable effect" of *intending* to impede the grand jury's proceedings, and the government was only required to show Brenkus's intention.

(App. at 31) (quoting *Aguilar*, 515 U.S. at 599) (citation omitted) (emphasis in original).

Based on this erroneous analysis, the Seventh Circuit affirmed Brenkus's conviction under 18 U.S.C. § 1503 and his resulting 78-month sentence on that count.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit affirmed Brenkus's conviction without requiring the government to prove that Brenkus knew his actions would likely affect a judicial proceeding. As discussed below, the Seventh Circuit's improperly narrow interpretation of the knowledge requirement of 18 U.S.C. § 1503 is contrary to this Court's precedents, deepens a split among federal circuit courts, and unfairly criminalizes conduct without the requisite *mens rea* under a statute that is becoming an increasingly popular and expansive tool of federal prosecutors.

Based on this Court's prior opinions—most notably the Court's seminal decision in *United States v.*

Aguilar, 515 U.S. 593 (1995)—the government must prove that the defendant knew that his actions were likely to affect a judicial proceeding in order to establish a violation of the Omnibus Clause of § 1503. As the Court clearly emphasized in *Aguilar*, "if the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct." *Id.* at 599. The Seventh Circuit's opinion below, however, omitted this critical element from § 1503 and upheld Brenkus's conviction based solely on an objective assessment that his actions were likely to affect a judicial proceeding, without any evidence that he contemplated such likelihood.

The Seventh Circuit's opinion below not only conflicts with this Court's decision in *Aguilar*, and its subsequent decision in *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005), but it also conflicts with the opinions from the First, Second, Third, and Eighth Circuits, each of which correctly requires the government to prove that the defendant knew his actions were likely affect a judicial proceeding in order to sustain a conviction under § 1503.

The Seventh Circuit's misapplication of the knowledge requirement under § 1503 creates a situation in which a defendant can be found guilty because his actions—*unbeknownst to the defendant*—had the potential to affect a judicial proceeding. This result not only dramatically and incorrectly expands the reach of § 1503, but it also creates a significant disparity in the application of a common and widely applicable federal criminal statute depending solely

on the federal judicial circuit in which the defendant happens to be charged.

For these reasons, Brenkus respectfully requests that this Court grant a writ for certiorari in this case.

I. The Seventh Circuit's Analysis Conflicts with this Court's Prior Precedents Construing 18 U.S.C. § 1503.

Section 1503 is the general federal obstruction of justice statute, and it has three distinct clauses. The first two prohibit "corrupt" or coercive efforts to "influence, intimidate, or impede" jurors or other actual officers of a court. 18 U.S.C. § 1503(a) (2006). The third, known as the "Omnibus Clause," prohibits "corrupt[]" or coercive attempts "to influence, obstruct, or impede, the due administration of justice." *Id.; Aguilar*, 515 U.S. at 598. This appeal and petition involve only the Omnibus Clause of § 1503.

In *Aguilar*, 515 U.S. at 593, this Court interpreted the reach of the Omnibus Clause of § 1503 and stressed the importance of the knowledge requirement. In that case, the defendant illegally disclosed his knowledge of government wiretapping and then lied to FBI agents investigating his conduct. *Id.* at 600. The Court rejected the government's argument that the defendant violated § 1503 even though the defendant knew a grand jury was investigating and receiving evidence regarding his conduct and even though he lied to FBI agents who were potential witnesses before that grand jury. *Id.* at 600-01.

In reaching this conclusion regarding the reach of § 1503, Chief Justice Rehnquist, writing for the six-member majority of the Court, explained that "[t]he action taken by the accused must be with an intent to influence judicial or grand jury proceedings." *Id.* at 599.[5] To determine whether such intent existed, the majority adopted a "nexus" test that had been used by several appellate courts. This test focused on objective elements (e.g., relationship in time, causation, or logic) to establish that a defendant's actions have the "natural and probable effect" of interfering with a judicial proceeding. *Id.* But in addition to this required objective effect on a judicial proceeding, Chief Justice Rehnquist emphasized that a defendant must also be aware of the likely effect of his actions on the judicial proceeding in order to have the requisite intent under § 1503: "[I]f the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct." *Id.* (citing *Pettibone v, United States*, 148 U.S. 197 (1893)).

Based on this formulation, the Court in *Aguilar* held that the evidence regarding the defendant's intent was insufficient to establish a violation of § 1503.

> We think that the transcript citation relied upon by the Government would not enable a rational trier of fact to conclude *that respondent knew that his false statement would be provided to the grand jury*, and that the

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[5] Justices Stevens, O'Connor, Souter, Ginsburg, and Breyer joined this portion of the Chief Justice's opinion.

> evidence goes no further than showing that respondent testified falsely to an investigating agent. Such conduct, we believe, falls on the other side of the statutory line from that of one who delivers false documents or testimony to the grand jury itself.

Id. at 601 (emphasis added).

The three dissenting justices correctly recognized the import of the majority's holding. While disagreeing with the necessity or appropriateness of such a knowledge requirement, Justice Scalia, joined by Justices Kennedy and Thomas, acknowledged that the "Court apparently adds to its 'natural and probable effect' requirement the requirement that that the defendant *know* of that natural and probable effect." *Id.* at 613 (Scalia, J., concurring in part and dissenting in part) (emphasis in original).

Any ambiguity and internal divisions regarding the scope of this knowledge requirement of § 1503 were apparently resolved by the time the Court revisited the meaning of *Aguilar* a decade later in *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005). In *Andersen*, Chief Justice Rehnquist again authored the opinion of the Court, but this time wrote on behalf of all nine Justices. The Court in that case faced a "similar situation" to that confronted in *Aguilar*, this time regarding the scope of an analogous obstruction provision, 18 U.S.C. § 1512(b)(2)(A) and (B). *Id.* at 708. Chief Justice Rehnquist thus revisited his earlier decision in *Aguilar* and explained that the Court had held in

that case that § 1503 required a "'nexus' between the obstructive act and the proceeding." *Id.* (quoting *Aguilar*, 515 U.S. at 599-600). Chief Justice Rehnquist, on behalf of a unanimous court, again emphasized that such a nexus required the government to prove that the defendant knew that his actions were likely to affect the judicial proceedings: "'If the defendant lacks knowledge that his actions are likely to affect the judicial proceeding,' we explained, 'he lacks the requisite intent to obstruct.'" *Id.* (quoting *Aguilar*, 515 U.S. at 599).

In its opinion below, the Seventh Circuit misread the Court's opinion in *Aguilar* and ignored the Court's subsequent opinion in *Arthur Andersen*. As a result, the Seventh Circuit erroneously construed § 1503 to require only that the defendant's acts, in the court's objective opinion, have the natural and probable effect of affecting a judicial proceeding *without any regard to whether the defendant was aware of such likelihood*. With respect to the knowledge required under § 1503, the Seventh Circuit mistakenly required only that the defendant acted knowingly, but failed to require—as this Court's opinions in *Aguilar* and *Arthur Andersen* plainly mandate—that the defendant knew that his actions were likely to affect the judicial proceeding.

In affirming Brenkus's conviction under § 1503, the Seventh Circuit fundamentally misconstrued the knowledge element under § 1503 and the critical nexus requirement Chief Justice Rehnquist articulated in *Aguilar* and *Arthur Andersen*. While the court did recognize the need for a "nexus" between the defendant's acts and the judicial proceeding, it

read the intent element far too narrowly. The Seventh Circuit required only "a connection between the defendant's intentional acts and the likelihood of potentially affecting the administration of justice," *Brenkus*, (App. at 26), while it ignored the required element that the defendant have knowledge that "his actions are likely to affect the proceedings." *Aguilar*, 515 U.S. at 599. Nowhere did the Seventh Circuit reference this knowledge requirement or apply it to the evidence the government presented. The court instead simply concluded that Brenkus's conduct "could very easily have had the 'natural and probable effect' of *intending* to impede the grand jury's proceedings." (App. at 31) (emphasis in original).

The Seventh Circuit's approach cannot be reconciled with *Aguilar* and *Arthur Andersen* because its intent inquiry is focused exclusively on whether the defendant's acts were intentional or knowing, without ever examining the defendant's knowledge or understanding regarding the likely effect of his acts. (App. at 29) ("A rational trier of fact could conclude beyond a reasonable doubt that Brenkus made the statements with the intention of obstructing the grand jury's investigation because there was a logical relationship between his knowing conduct—directing Marjan to fabricate—and the effect it was likely to have—keeping information from reaching the grand jury.").

Both the Seventh Circuit's formulation of the knowledge requirement under § 1503 and the result it reached below directly conflict with this Court's decision in *Aguilar*. In *Aguilar*, while aware that a

grand jury was investigating and receiving evidence regarding his conduct, the defendant lied to the FBI agents conducting the investigation. 515 U.S. at 600. The Court reversed Aguilar's conviction, however, because the government did not prove that he knew his actions would have the likely effect of keeping information from the grand jury. *Id.* at 601. Similarly here, Brenkus knew he made statements to Marjan, but the government did not prove—nor was the jury required to find—that the statements were made with any knowledge that his actions would likely affect a judicial proceeding.

As in *Aguilar*, the evidence and instructions in this case are insufficient to sustain a conviction under § 1503. The evidence of Brenkus's intent to obstruct a grand jury proceeding is even more attenuated than the evidence rejected by this Court in *Aguilar*. There is nothing in the recorded conversation between Brenkus and the government's undercover informant that indicates that either of them believed the undercover informant would be a witness before the grand jury. Although the undercover informant falsely suggested that another individual had received a grand jury subpoena, he did not state that he received a subpoena himself or that he expected to receive one, but rather he merely asked Brenkus whether he should "be scared." (R. 223 (Gov't Ex. 54)). In fact, the undercover informant himself testified at trial that that he understood the conversation with Brenkus to be referring to contacts with *law enforcement*, and not testimony before the grand jury. (Tr. 403-04). As in *Aguilar*, 515, U.S. at 600, the evidence only estab-

lished that the recipient of the defendant's statements "might or might not testify before a grand jury." Without more, these facts are insufficient to establish the requisite intent and knowledge under *Aguilar*. Had the Seventh Circuit correctly followed this Court's guidance in *Aguilar* and *Arthur Andersen*, it would have been required to reverse Brenkus's conviction.

The Seventh's Circuit approach below, while fundamentally at odds with this Court's prior guidance, is consistent with its own precedents. The Seventh Circuit had previously limited the intent requirement of § 1503 to the defendant's acts without requiring the government to prove the requisite knowledge of the likely effect of those acts on the judicial proceeding. *See, e.g., United States v. Muhammad*, 120 F.3d 688, 695 (7th Cir. 1997) ("[*Aguilar*] holds that a defendant's actions must demonstrate his intent to do something that has the natural and probable effect of obstructing justice."). The Seventh Circuit's construction of § 1503 effectively eviscerates the knowledge requirement that this Court clearly articulated in *Aguilar* and *Arthur Andersen*. Under the Seventh Circuit's incorrect formulation of § 1503, whenever there is conduct that might impede the due administration of justice, the government could only fall short of proving the intent requirement if a defendant did not act knowingly. It is hard to imagine such a case.

The Seventh Circuit's incorrect construction of § 1503 is particularly troublesome in this case because the district court rejected Brenkus's proposed jury instructions, which would have required the

jury to find, consistent with this Court's decision in *Aguilar*, that Brenkus expected the undercover informant to be a witness in a judicial proceeding. As Brenkus was tried and convicted under an incorrect interpretation of the charging statute, the writ for certiorari should be granted and the Seventh Circuit's opinion should be reversed.

II. The Seventh Circuit's Decision Deepens the Circuit Split Regarding the Appropriate Construction of 18 U.S.C. § 1503.

In misapplying the knowledge requirement of § 1503, the Seventh Circuit deepened and broadened the conflict among federal circuit courts on this important issue. While the majority of federal circuits have correctly interpreted and followed *Aguilar* in construing the knowledge requirement, the Seventh and Fifth Circuits continue to apply only an objective test to the "natural and probable" effect prong of the *Aguilar* analysis. This divergence of the federal circuits regarding the construction of a critical element of a widely-used federal criminal statute strongly calls for this Court's intervention.

A. The Majority of Circuits Correctly Follow *Aguilar* and Require that a Defendant Know that His Actions Are Likely to Affect a Judicial Proceeding.

The Seventh Circuit's ruling below conflicts with the opinions of the First, Second, Third, and Eighth and Circuits, each of which interprets § 1503 in conformity with this Court's opinion in *Aguilar* and requires the government to prove that the defendant

knew of the likely effect of his actions on the judicial proceeding.

The Second Circuit's law construing § 1503 is the most developed of any circuit, and it plainly contradicts the Seventh Circuit's opinion below. In a number of recent decisions, the Second Circuit has carefully and correctly analyzed the reach of § 1503 and adhered to the principles established by this Court in *Aguilar* and *Arthur Andersen*.

Beginning in *United States v. Schwarz*, 283 F.3d 76 (2d Cir. 2002), the Second Circuit has expressly required that a defendant know that his actions are likely to affect a judicial proceeding. In that case, several defendants, all police officers, assaulted a man in their custody. *Id.* at 79-80. The defendants later lied to federal and state prosecutors to protect a conspirator and were charged with and convicted of conspiracy to obstruct justice in violation of § 1503. *Id.* at 80. The government tried to distance the facts in that case from *Aguilar* on the grounds that the latter concerned direct charges of obstruction of justice, rather than conspiracy to obstruct justice. The Second Circuit correctly dismissed this argument, holding that in both conspiracy and direct charges under § 1503, the same specific intent requirement exists. The Second Circuit correctly read *Aguilar* to require that "the conduct offered to evince that [requisite] intent must be conduct that is directed at the court or grand jury and that, *in the defendant's mind*, has the 'natural and probable effect' of obstructing or interfering with that entity." *Id.* at 109 (emphasis added).

The Second Circuit then concluded in *Schwarz* that the government did not set forth sufficient evidence to prove beyond a reasonable doubt that the defendants knew that their actions would likely affect a grand jury proceeding.

> [The defendant] may have hoped that [his statements] would be provided to the grand jury, and surely there was that possibility; but there was insufficient evidence to "enable a rational trier of fact to conclude that [the defendant] knew" that this would happen or that he entertained any expectations on that score that were based on such knowledge. At best, the government proved that [the defendant], knowing of the existence of a federal grand jury investigation, lied to federal investigators regarding issues pertinent to the grand jury's investigation. The government has therefore failed to offer sufficient evidence of [the defendant's] intent to obstruct the federal grand jury for *"if the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct."*

Id. (quoting *Aguilar*, 515 U.S. at 599) (emphasis added). Accordingly, the Second Circuit reversed the defendants' convictions for conspiracy to violate § 1503. *Id.* at 110.

Since *Schwarz*, the Second Circuit has continued to consistently and correctly apply the standard enunciated in *Aguilar*. For example, in *United States v. Bruno*, 383 F.3d 65 (2d Cir. 2004), the Second Cir-

cuit again emphasized that, "the conduct offered as proof of the intent to obstruct a federal proceeding must, '*in the defendant's mind* [have had] the natural and probable effect of obstructing [the proceeding].'" *Id.* at 87 (citations omitted) (emphasis added). As in *Schwarz*, the Second Circuit held that the government had not established the requisite intent and thus reversed the conviction under § 1503. *Id.* at 87-90; *see also United States v. Quattrone*, 441 F.3d 153, 173 (2d Cir. 2006) (affirming conviction because evidence established that defendant "*knew* 'that his actions [were] likely to affect the judicial proceeding'") (quoting *Aguilar*, 515 U.S. at 599) (emphasis added); *United States v. Giovanelli*, -- F.3d ---, 2006 U.S. App. LEXIS 24463, *8 (2d Cir. Sept. 27, 2006) (affirming conviction because evidence supported the conclusion that defendant "*knew* 'that has actions [were] likely to affect the judicial proceeding") (quoting *Aguilar*, 515 U.S. at 599) (emphasis added).

Other circuits have also recognized that this Court's decision in *Aguilar* requires them to determine whether the defendant has "knowledge that his actions are likely to affect the judicial proceeding." *See, e.g., United States v. Davis*, 183 F.3d 231, 241 (3d Cir. 1999) (quoting *Aguilar*, 515 U.S. at 599). In *Davis*, the police officer defendant attempted to interfere with a federal investigation by alerting local crime bosses of an undercover informant's affiliation with law enforcement, and he was subsequently charged with obstruction of justice. *Id.* at 237-38. The Third Circuit reversed the defendant's conviction under § 1503 because the government failed to establish a pending judicial proceeding at the time of

the alleged obstruction and because the evidence, while sufficient to establish that defendant "knew that this actions had the natural and probable effect of interfering with a federal investigation," was insufficient to establish that the defendant knew his actions were likely to affect a judicial proceeding. *Id.* at 242.

In *United States v. Russell*, 234 F.3d 404, 406 (8th Cir. 2000), the Eighth Circuit also correctly applied the *Aguilar* knowledge requirement, affirming defendant's convictions because it concluded that "there is substantial evidence that [defendant] had knowledge that the 'natural and probable effect' of his actions would be to interfere with the administration of justice in [the] prosecutions." *See also United States v. Donato-Morales*, 382 F.3d 42, 49 (1st Cir. 2004) (recognizing that specific intent to obstruct justice is shown under *Aguilar* "when the defendant knows his actions are 'likely' to affect the outcome of the judicial proceeding"); *United States v. Scungio*, 255 F.3d 11, 18 (1st Cir. 2001) (recognizing that "essential element" of § 1503 is defendant's knowledge that his statements would obstruct proceeding by being provided to the grand jury).

B. The Fifth and Seventh Circuits Continue to Misconstrue 18 U.S.C. § 1503 in the Wake of *Aguilar*.

As set forth above, the Seventh Circuit's interpretation of § 1503 and *Aguilar* directly conflicts with the opinions of the First, Second, Third, and Eighth Circuits, each of which correctly requires that the government prove that the defendant knew

his actions were likely to affect a judicial proceeding. The Fifth Circuit also improperly limits the knowledge element under § 1503 in a manner inconsistent with *Aguilar* and *Arthur Andersen.*

Like the Seventh Circuit, the Fifth Circuit interprets the intent element under § 1503 to apply only to the defendant's own acts, and not to the likely consequences of those acts. In *United States v. Sharpe*, 193 F.3d 852, 865 (5th Cir. 1999), the Fifth Circuit reviewed a defendant's challenge to the sufficiency of the evidence supporting his conviction under § 1503. The Fifth Circuit in *Sharpe* misinterpreted the intent requirement, concluding that "[u]nder Section 1503, an act with the 'natural and probable effect' of interfering with the due administration of justice satisfies the intent requirement for obstruction of justice." *Id.* at 865 (quoting *Aguilar*, 515 U.S. at 599). Like the Seventh Circuit, the Fifth neglected entirely the requirement that the government must also prove that *the defendant knew* that his actions had the natural and probable effect of affecting the proceeding.

This broad and deepening division among the federal circuits regarding the proper scope of conduct that can be prosecuted under the general federal obstruction of justice statute warrants further guidance from this Court.

III. The Seventh Circuit's Misapplication of 18 U.S.C. § 1503 Criminalizes Conduct Without Fair Warning.

Because of the deepening circuit split over the proper construction of § 1503, the line dividing guilt from innocence for a large class of criminal defendants is ambiguously and inconsistently drawn. Due to this split of authority, the elements the government must prove to establish a violation of § 1503 is far from clear, and now depends on the circuit in which a defendant is charged. The Court has a long and important tradition of trying to avoid such confusion, if at all possible. Justice Holmes, writing for a unanimous Court in 1931, aptly noted:

> Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.

McBoyle v. United States, 283 U.S. 25, 27 (1931). When the interpretation of the same federal law depends not on one's conduct but rather on one's location, neither is fair warning given nor is a clear line drawn.

Clarity is particularly important in this area of the law because the Omnibus Provision of § 1503 has wide-ranging applicability, applying to any form of

attempt to interfere with any type of judicial proceeding. Such an endeavor to obstruct might occur during an investigation or proceeding relating to any one of hundreds of underlying federal criminal offenses. Moreover, charging obstruction of justice offenses has become an increasingly popular strategy of federal prosecutors, who often charge, as they did here, an obstruction of justice count in addition to the substantive offenses. Or, as in a number of notable recent white collar prosecutions, prosecutors have charged obstruction of justice in lieu of the underlying substantive offenses. In either scenario, as demonstrated below, the obstruction of justice provisions allow a defendant to be convicted and sentenced even if the government cannot prove the defendant committed the underlying offenses. For this reason, it is doubly important that the line dividing legal from illegal conduct in this area be clear.

As there are two conflicting interpretations of a federal criminal statute, the Court should grant the writ of certiorari and construe § 1503 narrowly. When two interpretations of a federal criminal statute are consistent with the wording of the statute, the Court has commented that "[d]ue respect for the prerogatives of Congress in defining federal crimes prompts restraint in this area, where we typically find a 'narrow interpretation' appropriate." *Dowling v. United States*, 473 U.S. 207, 213 (1985) (citation omitted). Congress has the power to clearly and articulately define the elements of obstruction of justice, but to the extent that it has not done so, the Court should read the statute narrowly. Pursuant to

the "time-honored interpretive guideline that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," *id.* at 229 (quoting *Liparota v. United States*, 471 U.S. 419, 427 (1985)) (internal quotations omitted), this Court should adhere to its prior interpretation of § 1503, as articulated in *Aguilar* and reinforced in *Arthur Andersen*.

The expansive interpretation of § 1503 employed by the Seventh and Fifth Circuits cannot be reconciled with these important principles. As noted above, those circuits' interpretation would allow a defendant to be convicted of obstructing justice without any showing that he knew that his actions were likely to affect a judicial proceeding, as long as his actions themselves were knowing and intentional. Thus, under their construction of § 1503, a defendant who intentionally lied to an individual who—unbeknownst to the defendant—had received a grand jury subpoena, could be guilty of obstructing justice. Yet, this exactly the scenario rejected by this Court in *Aguilar*.

Because Brenkus was tried and convicted under an incorrect formulation of § 1503 and without any showing that he knew his actions were likely to affect a judicial proceeding, Brenkus respectfully requests that the Court grant the writ of certiorari and reverse the Seventh Circuit's opinion.

CONCLUSION

For the reasons provided above, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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October 12, 2006

APPENDIX

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PETER R. MACARI and ALBIN C. BRENKUS,
Defendants-Appellants.

Nos. 04-2151, 04-2253

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

453 F.3d 926

April 14, 2005, Argued
July 14, 2006, Decided

For UNITED STATES OF AMERICA, Plaintiff-Appellee (Nos. 04-2151, 04-2253): Julie Peters Pekron, OFFICE OF THE UNITED STATES ATTORNEY, Chicago, IL USA.

For PETER R. MACARI, Defendant-Appellant (No. 04-2151): Stephen E. Eberhardt, Tinley Park, IL USA.

For ALBIN C. BRENKUS, Defendant-Appellant (No. 04-2253): Douglas E. Whitney, MCDERMOTT, WILL & EMERY, Chicago, IL USA.

Before COFFEY, RIPPLE, and KANNE, Circuit Judges.

COFFEY, *Circuit Judge.* On November 6, 2003, a federal grand jury returned a fourteen-count indictment against Albin Brenkus, Peter Macari, and seven other members (or prospective members) of a Chicago projectionist union, known as Local 110, on charges of arson and, in Brenkus's case, obstruction of justice. A jury acquitted Brenkus of the arson-related charges but convicted him of obstruction of justice, and he was sentenced to a term of seventy-eight months. On appeal, Brenkus challenges the sufficiency of the evidence presented on his *18 U.S.C. § 1503* obstruction of justice conviction as well as the district court's jury instructions on the obstruction of justice count.[1] We affirm the judgment of the district court as it relates to Brenkus.

Prior to trial, Macari pled guilty to one count of conspiracy to promote arson in interstate travel and one count of aiding and abetting arson and was sentenced to a term of forty-six months. Thirty-six months of Macari's sentence were to be served

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[1] Initially, Brenkus also challenged his sentence as violative of *Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)*, and as miscalculated under the Guidelines; however, on February 7, 2005, after the Supreme Court announced its decision in *United States v. Booker, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005)*, Brenkus withdrew his *Sixth Amendment* challenge to his sentence in his supplemental brief, stating: "Brenkus waives any right he may have to resentencing under the Supreme Court's decision in *Booker*, and hereby waives his challenge to his sentence." Thus, this issue is no longer before this court.

concurrently with a ten-year Illinois state sentence he was presently serving on a related, attempted first degree murder charge, and the remaining ten months of his federal sentence were to be served consecutive to his state sentence. Macari appeals only the ten-month portion of his federal sentence that he was ordered to serve consecutive to his state sentence.

Because we are unable to ascertain from the record whether the district court would have imposed the same sentence on Macari under an advisory guideline scheme, we order a limited remand, with respect only to the question of whether his ten-month consecutive sentence is in accordance with the procedures outlined in *United States v. Paladino, 401 F.3d 471 (7th Cir. 2005).*

I. Background

A. Incendiary Attacks

In 1998, the Motion Picture Projectionists, Operators, and Video Technicians, Local 110 of the International Alliance of Theatrical Stage Employees of the United States and Canada, AFL-CIO ("Local 110"), was comprised of approximately 350 members. From late 1997 through 2001, Brenkus was the secretary-treasurer of Local 110 and served as Local 110's second-in-command, and his duties included the negotiation and renegotiation of collective bargaining agreements between Local 110 and various theater companies.

In 1998, Local 110 faced two major problems. AMC Entertainment, Inc. ("AMC"), a Chicago area

theater company, refused to enter into a collective bargaining agreement with Local 110.[2] Also, Local 110's contracts with two other Chicagoland theater companies--Loews Theaters Exhibition Group ("Sony/Loews") and Cineplex Odeon Corporation ("Cineplex")--were about to expire, and if new contracts could not be negotiated, the union was fearful other jobs would be lost. To induce the theater companies to renew or enter into agreements, Brenkus and other members of Local 110 began a coordinated campaign to put pressure on the theater companies. Initially, the campaign involved a public relations effort, including the advertising of the labor conflict through the picketing of theaters; however, after this proved unsuccessful, the campaign evolved into acts of vandalism on the part of the union designed to cause economic harm.

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[2] In the mid-1990's, Local 110 had entered into a collective bargaining agreement with AMC, but sometime prior to 1998, AMC sold all of its Chicago theaters and its contract with Local 110 expired. In 1998, AMC re-entered the Chicago theater market, and Local 110 attempted to rekindle its relationship with AMC. Unfortunately for the members of Local 110, AMC failed to respond to any advancements by Local 110, making clear that it had no intention of re-entering into any collective bargaining agreement with Local 110. AMC's presence in the Chicago suburbs caused a problem for Local 110 not only because AMC refused to hire its members, but also because AMC's actions inspired Sony/Loews to question whether it should renew its own contract with Local 110.

In February of 1998, Brenkus discussed the concept of the use of an incendiary device to Kent Dickinson, a Local 110 projectionist and fellow union negotiating committee member.[3] According to Dickinson, Brenkus planned to use the apparatuses in the two Chicago area AMC theaters in hope of conveying a clear message to AMC. Dickinson asked Carl Covelli, another Local 110 member, to enlist two non-union members (referred to at trial only as "Covelli's boys") to assist Dickinson. On the evening of March 29, 1998, Dickinson planted two incendiary devices at an AMC theater in Warrenville, Illinois, while Covelli's boys conducted a simultaneous strike in Barrington, Illinois. The media uncovered the motive for this felonious conduct, and these tactics generated a large amount of negative publicity against Local 110. Thus, shortly after the publicity relating to these two incidents, Brenkus ordered Dickinson to cease incendiary operations in the Chicago area.

According to Dickinson, in order to pressure Loews to renegotiate a contract with Local 110, Brenkus decided that more acts of vandalism were

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[3] The incendiary devices used by Local 110 members consisted of a combination of chlorine tablets and brake fluid. The resulting mixture often produced smoke with a strong chlorine smell and visible flames. An important feature of the incendiary devices was the delay between combining the ingredients and any noticeable production of smoke and smell. The time delay allowed members of Local 110 to place a device in a darkened auditorium and exit several minutes before patrons and theater employees realized the vandalism had occurred.

necessary. However, to avoid the negative publicity that resulted from the prior attacks, Brenkus ordered new acts of intimidation and violence to occur outside of the Chicago area. On June 7, 1998, Dickinson and another Local 110 member, Peter Lipa, traveled to Indianapolis, Indiana, where Dickinson placed incendiary instruments in two Loews theaters. Then, on July 24, 1998, Local 110 members Joseph Marjan and Gregory Tortorello, Jr. set off smoke producing flares in a Loews theater in Streamwood, Illinois, and on August 2, 1998, Dickinson and Marjan discharged incendiary devices in a Loews theater in Beavercreek, Ohio.

After the Ohio incident, Brenkus expressed his dissatisfaction with the lack of success with the intimidation tactics, noting that they were not having the desired effect as Loews continued to refuse to negotiate a new contract with the Local. Despite his complaints about the lack of success of their approach, Brenkus instructed Dickinson to set off an incendiary gadget at Loews' flagship theater in New York, New York, in August of 1998. Shortly after this episode, Loews decided to resume contract negotiations with Local 110. However, Loews delayed signing the new contract, and, as a result, Brenkus instructed Dickinson to execute another incursion against Loews. On October 3, 1998, Dickinson and Marjan discharged an incendiary device in two Loews theaters in Secaucus, New Jersey, and, shortly thereafter on October 27, 1998, Loews entered into a collective bargaining agreement with Local 110.

In late 1998, a fourth theater company, Cinemark, U.S.A., Inc. ("Cinemark"), entered Chicago's first-run theater market,[4] and Local 110 sent letters of introduction to Cinemark management in an effort to initiate contract negotiations. Despite repeated requests, Cinemark refused to negotiate with Local 110. Thus, in order to induce negotiations, and encouraged by the perceived capitulation of Loews, Local 110 members began targeting Cinemark. On November 14, 1998, Marjan planted incendiary instruments in a Cinemark theater in North Aurora, Illinois, and, on December 5, 1998, he placed incendiary devices in a Cinemark theater in Joliet, Illinois. On February 27, 1999, Dickinson and Marjan set off an incendiary invention in a Cinemark theater in North Canton, Ohio, and on April 3, 1999, they struck two other Cinemark theaters in Lexington, Kentucky. On May 15, 1999, Dickinson, Marjan, and Michael Rossi, another one of "Covelli's boys" who did not belong to Local 110 at the time but hoped to "earn" or gain his way in, placed incendiary devices in two Cinemark theaters in Dallas, Texas, and in two theaters near Cinemark's headquarters in Plano, Texas.

After waiting several weeks without a response from Cinemark, on June 6, 1999, Dickinson and Marjan struck a Cinemark theater in Mishawaka, Indiana, and on June 27, 1999, they struck another Cinemark theater in Kenosha, Wisconsin. On July 10, 1999, Dickinson traveled alone to Ames, Iowa, to carry out yet another strike on a Cinemark theater,

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[4] First-run theaters show only newly released films.

and a final assault occurred on August 20, 1999, against one of their theaters in Merriam, Kansas. After the Kansas trip, Dickinson informed Brenkus that he and Marjan would no longer participate in the planting of any more incendiary apparatuses, and Brenkus agreed, instructing Dickinson to stop the offensive due to increased investigatory "heat."

B. Assault of Theater Manager Leyland

According to the witnesses, in addition to the plan of intimidation through the use of incendiary devices, throughout the summer of 1999, members of Local 110 picketed in front of non-union theaters, including a Cinemark theater in Melrose Park, Illinois. Cinemark's corporate headquarters instructed Jeffrey Leyland, the Melrose Park Cinemark theater manager at the time, to photograph the union picketers. According to Covelli, in response to Leyland's actions, Brenkus began taking pictures of Leyland and asked Covelli if he "could get somebody to slap [Leyland] around." Covelli contacted his brother, Louis, and Louis contacted a Peter Macari, who, at the time, was training to become a union projectionist. In July or August of 1999, Louis and Carl Covelli met with Macari. At that meeting Carl Covelli informed him that before he could start working as a union projectionist, "the boss" needed him to "send a message to [Leyland]" by "giving him a beating."[5] After mulling the matter over for a week, Macari agreed to fulfill or participate in the requested

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[5] Macari testified that "the boss" was Brenkus.

assault in exchange for a promise of employment with the union.

On the morning of August 18, 1999, Macari ambushed Leyland outside of his home in Elmhurst, Illinois, and struck him "three times" with a baseball bat, including once in the head. As a result of the beating, Leyland suffered multiple skull fractures, a broken arm, and broken fingers.[6] On August 20, 1999, Brenkus personally thanked Macari and remarked, "I think [Leyland] got the message. I'm going to recommend that you start working probably starting the following week." Despite this assurance, Macari never did work as a union projectionist for the Illinois State Police and the FBI began investigating his participation in the Leyland assault resulting in his arrest on June 13, 2003. After his arrest, he received $ 5,000 from Local 110 to retain counsel. On June 16, 2003, Macari pled guilty to an Illinois state charge of attempted first degree murder and was sentenced to ten years' imprisonment.

C. Investigation

James Grady, a special agent with the Bureau of Alcohol, Tobacco, and Firearms ("ATF"), began investigating Local 110 in 1998 for an unrelated incendiary gadget incident but the initial investigation went stale shortly after the case was

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[6] At sentencing, the parties stipulated that Leyland suffered life-threatening or permanent injuries within the meaning of *Guideline § 2A2.2.*, and that a baseball bat was used in the assault.

opened. He did not pursue Local 110 again until early 2003 when he interviewed Gregory Tortorello about the incendiary attacks against the theaters. Although he noted that he was not personally involved with the theater probe until 2003, Grady testified during Brenkus's trial that "other federal agencies" had been conducting investigations into the incidents between "2001 and 2003."

Special agent John Mallul of the Federal Bureau of Investigation ("FBI") began looking into Local 110 in 2001. He was involved in a proffer session with Dickinson in September of 2002, and on November 19, 2002, he acquired evidence from the Warrenville Police Department regarding property vandalism to the AMC theater in Warrenville, Illinois, that occurred in March of 1998. By 2003, there was a grand jury investigation into Local 110's role in the theater attacks that had been "ongoing" and that the FBI's investigation resulted in the grand jury's indictment of Local 110 members on arson and obstruction of justice charges. Special agent John Malooly of the ATF likewise testified that the FBI had been investigating the use of incendiary devices as far back as 2001. He noted that on October 9, 2001, FBI chemist Ronald Kelly prepared a report concerning the chemical properties of the incendiary devices used by Local 110 members for use in the investigation.

Jody Colangelo, Local 110's office manager from 1995 through June of 2000, verified that in August of 1999, Local 110 received a subpoena from the FBI requesting Local 110's "records, lists of names, phone numbers, rosters, [and] things of that nature." The

subpoena was issued under the name of the SPECIAL JANUARY 1999-1 Grand Jury ("1999 Special Grand Jury subpoena"). Colangelo stated that when she received the 1999 Special Grand Jury subpoena, she made two copies and provided one copy to Steve Spano, the president of Local 110, and the other copy to Brenkus. According to Colangelo, after she gave copies to Spano and Brenkus, she met with them to discuss the items ordered to be turned over in compliance with the subpoena.

Joseph Marjan disclosed that in March of 2001, FBI agents contacted him and requested his cooperation with the investigation into Local 110's acts of vandalism on theaters. Marjan agreed to assist and cooperate with the FBI and he proceeded to meet with FBI agents more than twenty times from March 2001 until "about the grand jury."[7] He also revealed that, around the same time he began cooperating with the FBI, he met with assistant United States attorneys from the Northern District of Illinois to discuss Local 110's activities in 1998 and 1999.

At the request of FBI agents, Marjan agreed to record his conversations with union members believed to be involved in the incendiary scheme, including Dickinson and Brenkus. On June 5, 2001, Marjan recorded a conversation with Dickinson, at which time Dickinson admitted his involvement in

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[7] The "grand jury" that Marjan referred to in his testimony was the Special February 2002-2 Grand Jury, convened in February of 2002, that indicted Brenkus and other Local 110 members.

several of the crimes.[8] Then, on October 22, 2001, Marjan recorded a conversation between he and Brenkus after a Local 110 meeting at the union's headquarters in Chicago. According to Marjan, after the meeting they retreated to a utility room in the building to discuss the incendiary attacks. During this conversation, Marjan told Brenkus that Scott Fagan, another union projectionist, had revealed to him that "Covelli was involved in the grand jury and . . . you know, he's the second person this month." Marjan then asked Brenkus, "[S]hould I be scared?" Marjan understood Brenkus's response and direction to be "if anyone came to me [Marjan], any law enforcement comes to me tell them that I don't know nothing" and to deny any knowledge of any illegal activities conducted by Local 110.[9] Marjan and

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[8] According to Marjan, his tape recorded conversation with Dickinson gave the government "a lot of evidence about what Kent Dickinson did and said and knew" regarding the scope of Local 110's incendiary activities.

[9] The exact transcription of the audiotape is disputed by the parties. The parties provided separate transcripts of the recorded conversation at trial. However, due to the inconsistencies found in the submitted transcripts, only the actual audiotape of the recorded conversation was admitted into evidence and not the transcripts. According to Marjan and the government, during their conversation Brenkus said, "I think you should say you don't know nothing," and "just play stupid." Brenkus argues that in the recording you only hear Brenkus state to Marjan, "[Y]ou don't know nothing," and that Brenkus never preceded this phrase with "I think you should say, "nor did he tell Marjan to "just play stupid." According to Marjan, the difficulty in deciphering the audiotape is due

(continued...)

Brenkus also discussed Rossi's training as a projectionist. Marjan testified that Brenkus told him that if "law enforcement" ever asked him whether he had trained Rossi, he was to deny it.

On October 27, 2001, a few days after Marjan's recorded conversation with Brenkus, FBI agents served Dickinson with a subpoena to appear before the grand jury then sitting. The following day, Dickinson met with Brenkus to discuss his subpoena and visit from the FBI. According to Dickinson's trial testimony, Brenkus said that he also received a grand jury subpoena. The next month, in November of 2001, Dickinson met with government representatives to discuss his involvement in the incendiary attacks.[10] From November of 2001 until

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to the fact that the utility room in which he and Brenkus talked contained equipment that exuded "a loud exhaust sound."

[10] It is unclear from the trial testimony to whom Dickinson was referring when he said that he met with "the government." However, it is clear from the following exchange that he was not referring to the FBI:

> Q: Now, this wasn't the first time that you sat and met with the government and [FBI] agents and told them about these activities, was it? You met with them earlier, isn't that true?
> A: I'm going to say yes because you said earlier that [that] was my second [meeting.]
> Q: In fact, you met with them November 21st of 2001.
> A: Okay, that would be the first visit, okay.

(continued...)

May 23, 2002--the date Dickinson testified before the February 2002-2 Special Grand Jury that indicted Brenkus--Dickinson participated in "several" meetings with both the FBI and other unidentified government officials, providing them with detailed information about the incendiary attacks.

D. Brenkus's Trial and Sentencing

On November 6, 2003, a federal grand jury returned a fourteen-count indictment against Brenkus, charging him with thirteen counts of arson-related offenses (Counts 1 through 13), stemming from the use of incendiary devices in theaters, and one count of obstruction of justice in violation of *18 U.S.C. § 1503* (Count 14), based on Brenkus's recorded statements to Marjan. Brenkus pled not guilty to all charges, and his case was tried before a jury beginning on March 1, 2004.

At the close of the evidence offered at trial, Brenkus proffered a set of proposed jury instructions to the district court on Count 14. Specifically, Brenkus requested that the jury be instructed that in order to find him guilty of obstruction of justice

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Q: Maybe I can help you. The FBI visited with you in October of 2001?
A: Right. Correct.
Q: And then the next month you met with the government, correct?
A: Correct.
Q: And you had a lengthy discussion with them on that date, correct?
A: Yes.

based on his statements to Marjan, they had to find that Marjan "was a [grand jury] witness" and that Brenkus "endeavored to influence, intimidate, and impede Joseph Marjan by advising him to lie on account of his being a witness."[11] The district court rejected Brenkus's proposed instruction on Count 14, noting that influencing an actual witness is but one way to prove obstruction of justice. Instead, the district court followed the general, "catch-all"[12]

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[11] Brenkus's proposed instruction was modeled after a Seventh Circuit Pattern Criminal Federal Jury Instruction for a *§ 1503* obstruction of justice charge--Influencing or Injuring a Witness--which states, in relevant part:

> To sustain the charge of obstruction of justice, the government must prove the following propositions:
>
> First, that (name) was a witness;
>
> Second, that the defendant endeavored to [influence, intimidate, impede] (name) by (here insert act as described in the indictment) on account of his being a witness;
>
> Third, that the defendant acted knowingly; and
>
> Fourth, that the defendant's acts were done corruptly, that is, with the purpose of wrongfully impeding the due administration of justice.

[12] The term "catch-all" is referenced in the Seventh Circuit's form jury instructions. "This instruction is for use when the omnibus, or catch-all, provision of *Section 1503* is used." 2A Kevin O'Malley, et al., Federal Jury

(continued...)

Seventh Circuit Pattern Criminal Jury Instruction for obstruction of justice and instructed the jury as follows:

> To sustain the charge of obstruction of justice, the government must prove the following propositions:
>
> First, that the defendant endeavored to influence, obstruct, and impede the due administration of justice by directing and advising Joseph Marjan that in response to any inquiries in a federal grand jury investigation
>
> > (a) Marjan should state that he "don't know nobody," and that he "don't know nothin,"
> >
> > b) Marjan should further respond to any such inquiries by stating, "I don't know what you're talking about,"
> >
> > (c) In response to any inquiries regarding the projectionist training provided by Marjan and others to Michael Rossi, Marjan should state that he "didn't try to train nobody."

Practice & Instructions § 48.03 (5th ed. 2000), notes, Seventh Circuit, committee comment. *See also United States v. Aguilar, 515 U.S. 593, 598, 115 S. Ct. 2357, 132 L. Ed. 2d 520 (1995).*

> Second, that the defendant acted knowingly; and
>
> Third, that the defendant's acts were done corruptly, that is, with the purpose of wrongfully impeding the due administration of justice.
>
> If you find from your consideration of all the evidence that each of these propositions has been proven beyond a reasonable doubt, then you should find the defendant guilty.
>
> If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you must find the defendant not guilty.

The jury acquitted Brenkus of the arson-related charges (Counts 1 through 13) but found him guilty of obstruction of justice.

On May 1, 2004, the district court conducted Brenkus's sentencing hearing. Based on the testimony of Leyland, Covelli, and Macari, the trial judge enhanced Brenkus's base offense level for obstruction of justice from twelve to twenty-six and sentenced him to a prison term of seventy-eight months, the maximum term allowed under the Guidelines for a person without a criminal history and consisted of an offense level of twenty-six.

E. Macari's Sentence

The grand jury indictment of November 6, 2003, also charged Macari with three counts of arson, including one count of conspiracy to travel interstate to promote arson in violation of *18 U.S.C. § 371* (Count 2) and two counts of aiding and abetting travel in interstate commerce to promote arson in violation of *18 U.S.C. § 1952(a)(3)* (Counts 10 and 13).[13] On February 9, 2004, Macari pled guilty, without entering into a plea agreement, to Counts 2 and 13, and the district court, on the government's motion, dismissed Count 10. The district court sentenced Macari to a prison term of thirty-six months on Count 2, to be served concurrently with his ten-year Illinois state prison sentence for the attempted first degree murder of Leyland, and a term of ten months imprisonment on Count 13, to be served consecutive to his Illinois state prison sentence. Macari appeals only the ten-month consecutive prison sentence.

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[13] Covelli, Dickinson, Lipa, Marjan, Rossi and Tortorello were also named in the November 6, 2003, indictment and were charged with various arson-related crimes. Covelli, Dickinson, Marjan and Rossi all either pled guilty to their respective charges or the government voluntarily dismissed their charges. Lipa and Tortorello pled not guilty, were tried in the same trial as Brenkus, and were eventually acquitted of all charges against them.

II. Analysis

On appeal, Brenkus contends that the district court erred in denying his motion for judgment of acquittal arguing that the government failed to establish either that there was a "pending judicial proceeding" at the time of Brenkus's alleged obstruction or that Brenkus "corruptly intended" to influence that judicial proceeding as required for a conviction under *18 U.S.C. § 1503.* He also claims that the district court erred when it refused to accept his proposed jury instruction on his theory of the obstruction count and failed to *sua sponte* provide limiting instructions to the jury regarding Marjan's recorded statements to Brenkus. Brenkus did not request these limiting instructions at trial.

The only issue raised by Macari on appeal is whether the trial judge abused her discretion when she sentenced him to a ten-month federal prison sentence to be served consecutive to his ten-year Illinois state prison sentence.

A. Defendant Brenkus

1. Sufficiency of the Evidence

We review *de novo* the district court's decision to deny a motion for judgment of acquittal. *United States v. Jones, 222 F.3d 349, 351-52 (7th Cir. 2000).* In reviewing a jury conviction for sufficiency of the evidence, we consider the evidence in the light most favorable to the prosecution, drawing all reasonable inferences in the government's favor. *United States v. Paneras, 222 F.3d 406, 410 (7th Cir. 2000).* Reversal is appropriate only when, after viewing the

evidence in such a manner, no rational jury "could have found the defendant to have committed the essential elements of the crime." *Id.* (quoting *United States v. Masten, 170 F.3d 790, 794 (7th Cir. 1999)).* Thus, we will overturn the jury's verdict "'only if the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt.'" *United States v. Fassnacht, 332 F.3d 440, 447 (7th Cir. 2003)* (quoting *United States v. Granados, 142 F.3d 1016, 1019 (7th Cir. 1998)).*

Brenkus was convicted of obstruction of justice for violating the "Omnibus Clause," or "catch-all provision," of *18 U.S.C. § 1503* charging that he directed and advised Joseph Marjan to lie in response to inquiries in the grand jury investigation of Local 110's criminal activities. The "Omnibus Clause" of *§ 1503* makes it a crime to "corruptly . . . endeavor[] to influence, obstruct, or impede, the due administration of justice." *18 U.S.C. § 1503.* "[T]he due administration of justice," as that phrase is used in the statute, includes pending judicial proceedings. *United States v. Aguilar, 515 U.S. 593, 599, 115 S. Ct. 2357, 132 L. Ed. 2d 520 (1995); Fassnacht, 332 F.3d at447.* Accordingly, to prove an obstruction of justice charge under *§ 1503*, the government must demonstrate "that there was a pending judicial proceeding, that the defendant was aware of that proceeding, and that the defendant corruptly intended to impede the administration of that judicial proceeding." *Fassnacht, 332 F.3d at 447.* Brenkus asserts that the government failed to establish there was a pending judicial proceeding because it failed to prove that a grand jury had been impaneled at the time of Brenkus's alleged act of

obstruction of justice, and, furthermore, that even if the government had produced sufficient evidence to establish that a grand jury was sitting at the time of Brenkus's obstruction, it failed to establish that Brenkus corruptly intended to influence the grand jury.

It is well established that a grand jury investigation constitutes a pending judicial proceeding for purposes of *§ 1503. Id. at 448.* However, a government agency's investigation--such as the FBI's--that is separate and apart from the court's or the grand jury's authority does not constitute a "judicial proceeding." *Id.* (citing *Aguilar, 515 U.S. at 599*). In order to establish that an FBI investigation constituted a "judicial proceeding" for purposes of *§ 1503*, the government must establish that the FBI, at the time in question, was acting as an aid to and as an "arm of the grand jury" when it conducted its investigation, *i.e.*, that it undertook the investigation to supply information to the grand jury on this issue in direct support of a grand jury investigation. *Id. at 449.* To establish that the FBI was acting as an arm of the grand jury, the government must demonstrate that the FBI agents were "integrally involved" in the grand jury investigation, *Fassnacht, 332 F.3d at 449* (quoting *United States v. Furkin, 119 F.3d 1276, 1282-83 (7th Cir. 1997))*, and that the FBI's investigation of Local 110's activities was "undertaken with the intention of presenting evidence before [the] grand jury," *United States v. Maloney, 71 F.3d 645, 657 (7th Cir. 1995)* (citing *United States v. McComb, 744 F.2d 555, 561 (7th Cir. 1984)).*

The testimony of a number of witnesses at trial supports the finding that between August of 1999 and November of 2003 (when the indictment was returned against Brenkus and other members of Local 110), the FBI was gathering and presenting evidence sporadically to a grand jury investigating Local 110's criminal activities. Based upon the testimony of Jody Colangelo, Local 110's office manager from 1995 through June of 2000, the jury could very well have reasoned that a grand jury investigation into Local 110 began as early as August of 1999, when the FBI served Local 110 with a grand jury subpoena requesting its "records, lists of names, phone numbers, rosters, [and] things of that nature."[14] Colangelo testified that after receiving the subpoena, she provided copies of it to Spano and Brenkus and then met with the two of them to discuss how to respond. Additionally, Dickinson testified that in September of 1999, he informed Brenkus that he and Marjan would not participate in any future attacks because they "were just worn out." In response, Brenkus agreed that the attacks should cease due to increased investigatory "heat" and that they should "just stop everything." The testimony of Colangelo and Dickinson coupled with the grand jury subpoena from August of 1999 provide evidence from which the jury could find that a grand jury investigation into Local 110's theater attacks existed as early as 1999 and continued for

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[14] Although the FBI delivered the subpoena, it was issued under the name of the SPECIAL JANUARY 1999-1 Grand Jury.

some period of time and, additionally, that Brenkus had knowledge of the inquiry.

Additional evidence was presented that the 1999 investigation continued into 2001 and beyond. In March of 2001, FBI agents contacted Marjan and asked him to cooperate in the investigation into Local 110's incendiary attacks on theaters. Marjan testified at trial that from March 2001 until "about the grand jury," he participated in several FBI interviews and recorded conversations he had with both Dickinson and Brenkus for the purpose of gathering information related to Local 110's incendiary attacks at selected theaters. Additionally, special agent James Grady of the ATF testified that although he was not personally involved in the Local 110 investigation until 2003, other federal agencies had been conducting investigations into the incidents between 2001 and 2003. Another ATF agent, John Malooly, testified that on October 9, 2001, FBI chemist Ronald Kelly prepared a report concerning the chemical properties of the incendiary instruments used by Local 110 members. The jury could very well have reasonably inferred that one purpose for the preparation of Kelly's report was to present it to the grand jury.

Then, on October 27, 2001, just five days after Marjan's recorded conversation with Brenkus, FBI agents approached Dickinson at a gas station near his place of employment and played a tape of the incriminating conversation between he and Marjan that occurred on June 5, 2001. After the agents played the tape, they served Dickinson with a subpoena to appear before a grand jury. The next

day, Brenkus informed Dickinson that he also had received a grand jury subpoena. The following month, in November of 2001, Dickinson was asked to and began cooperating in the federal investigation. He stated that from November 2001 until he testified before the February 2002 Special Grand Jury that indicted Brenkus, he participated in several meetings with counsel for the government and the FBI and provided them with detailed information on Local 110's involvement in criminal activity including the vandalism of property and obstruction of justice. Of particular significance is the fact that FBI agents served Dickinson with a grand jury subpoena immediately after they played him the tape of the conversation with Marjan and that Brenkus was served with a grand jury subpoena that same day (or, at the latest, the next morning). This evidence, taken in the light most favorable to the prosecution, sufficiently demonstrates that the FBI's investigation had been undertaken with the intention of providing evidence to the grand jury. *Maloney, 71 F.3d at 657.*

Brenkus argues, relying on *United States v. Vaghela, 169 F.3d 729 (11th Cir. 1999)*, that the subpoenas issued to Dickinson and Brenkus do not establish that a judicial proceeding was pending at the time of Brenkus's obstruction because they were served five days after the obstruction date and they had not yet appeared before the grand jury. However, in *Vaghela*, there was no evidence to establish that *any* grand jury had been impaneled prior to the date the defendants allegedly obstructed justice. *Vaghela, 169 F.3d at 735.* Conversely, in this case, the government presented evidence that in

January of 1999, a grand jury had been impaneled to investigate into Local 110's activities. The jury could have rationally concluded, given the aforementioned evidence, that the original grand jury's term had been extended or that a subsequent grand jury had been impaneled to continue the ongoing investigation of Local 110. *See, e.g., 18 U.S.C. § 3331(a).*[15] As we have previously stated, "[t]he practice of transferring records and cases to subsequent grand juries is common." *McComb, 744 F.2d at 561 n. 5, 558.*

Contrary to Brenkus's argument, the temporal proximity between Marjan's recorded conversation with Brenkus and the issuance of grand jury subpoenas to Dickinson and Brenkus actually adds further support to the government's position that Marjan's wired conversation with Brenkus was part and parcel of the investigation undertaken with the intention of presenting evidence before an ongoing grand jury proceeding. *See McComb, 744 F.2d at 560-61* ("Rather than establish a rigid rule denominating some act of the grand jury that would be required to establish pendency, courts have asked 'whether the subpoena is issued in furtherance of an actual grand jury investigation, i.e., to secure a presently contemplated presentation of evidence before the grand jury.'"); *United States v. Simmons, 591 F.2d 206, 208 (3d Cir. 1979)* (government need

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[15] Although a special grand jury's term is ordinarily eighteen months, the term may be extended to up to thirty-six months if the district court determines that the sitting grand jury had not completed its business during the original term.

not demonstrate that the grand jury "has actually heard testimony or has in some way taken a role in the decision to issue the subpoena"). The existence of the 1999 grand jury as well as the issuance of grand jury subpoenas so closely on the heels of Brenkus's conversation with Marjan sufficiently demonstrates an effort by the FBI to secure a "presently contemplated presentation [*939] of evidence before the grand jury." This is particularly true since Brenkus challenges the sufficiency of the evidence, and reversal is only appropriate if there is no evidence in the record on this issue. *See Fassnacht, 332 F.3d at 447.* Considering the standard of review to view the evidence in the light most favorable to the prosecution and the evidence presented at trial, we reject Brenkus's contention that the government failed to present sufficient evidence that a "pending judicial proceeding" existed on October 22, 2001.

In addition to establishing a pending judicial proceeding, *§ 1503* requires the prosecution to demonstrate that Brenkus "corruptly intended" to impede the administration of the judicial proceeding in question. In *United States v. Aguilar*, the Supreme Court fashioned this requirement as a "nexus" between the accused's actions and the judicial proceeding. *515 U.S. at 599.* The "nexus" limitation is best understood as a connection between the defendant's intentional acts and the likelihood of potentially affecting the administration of justice:

> The action taken by the accused must be with an intent to influence judicial or grand jury proceedings; it is not enough that there

> be an intent to influence some ancillary proceeding, such as an investigation independent of the court's or grand jury's authority. Some courts have phrased this showing as a "nexus" requirement--that the act must have a relationship in time, causation, or logic with the judicial proceedings. In other words, the endeavor must have the "natural and probable effect" of interfering with the due administration of justice. This is not to say that the defendant's actions need be successful; an "endeavor" suffices.

Aguilar, 515 U.S. at 599 (citations and quotations omitted); *see also United States v. Quattrone, 441 F.3d 153, 170-71 (2d Cir. 2006).* Applying this standard, the Court in *Aguilar* struck down the obstruction of justice conviction of a United States District Court judge who provided false statements to an investigating agent where the agent had "not been subpoenaed or otherwise directed to appear before the grand jury." *515 U.S. at 601.* The Court vacated the conviction because the false statements could not "be said to have the 'natural and probable effect' of interfering with the due administration of justice." *Id.*

Brenkus compares his statements to Marjan--who, at the time of his recorded conversation with Brenkus, had not yet been subpoenaed to testify before the grand jury--to those made to the FBI agents by the *Aguilar* defendant. In essence, Brenkus argues that because there was no evidence presented that Marjan had been subpoenaed at the

time of the recorded conversation (and therefore was only a *potential* grand jury witness), Brenkus could not have intended to interfere with the grand jury's proceedings when he instructed Marjan to lie to the grand jury. However, this argument mischaracterizes *Aguilar*'s holding. Contrary to Brenkus's assertion, the *Aguilar* court did not draw a line between subpoenaed or "actual" and non-subpoenaed or "potential" witnesses. *See id. at 600-01.* Rather, the Court focused on the defendant's intent to obstruct the administration of justice when he performed the alleged act of lying to investigating FBI agents forming the basis for the obstruction of justice charge. *See id. at 598-601.* Because the FBI agents in *Aguilar* had not been subpoenaed when the defendant lied to them, the Court held that it was speculative at best as to whether the defendant knew that his false statements would ever reach the grand jury and therefore his actions--lying to the FBI agents--would not have had the "natural and probable effect" of impeding the grand jury investigation. *Id. at 601.*

In contrast, during their recorded conversation on October 22, 2001, Brenkus instructed Marjan to lie to the grand jury concerning the contents of the criminal activities of Local 110. In the recording, Marjan can be heard telling Brenkus that "Covelli was involved in the grand jury and Covelli got, you know, he's the second person this month," and then asking Brenkus, "[S]hould I be scared?" In response, Brenkus stated, "I think you should say you don't know nothing," and to "just play stupid." Then, in discussing possible inquiries into the training of union members such as Michael Rossi, Brenkus

instructed Marjan to say that he "didn't try to train nobody."[16] A rational trier of fact could conclude beyond a reasonable doubt that Brenkus made the statements with the intention of obstructing the grand jury's investigation because there was a logical relationship between his knowing conduct--directing Marjan to fabricate--and the effect it was likely to have--keeping information from reaching the grand jury.

Obviously, Brenkus's recorded statements to Marjan are more than sufficient to establish that he intended to affect the outcome of the grand jury investigation into Local 110.[17] Because the government presented evidence that Brenkus was aware of the pending grand jury investigation, *see supra* pp. 17-21, and because Brenkus's own words demonstrate that he intended to impede that

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[16] Although the parties contest the precise wording of Brenkus's responses to Marjan, the jurors, having listened to the tape, were free to accept or reject Brenkus's proposed version of the conversation, and, in our review, we consider the evidence in the light most favorable to the prosecution.

[17] The fact that Marjan was already cooperating with law enforcement at the time Brenkus instructed him to lie, and thus he never actually lied to the grand jury, does not relieve Brenkus of liability under *§ 1503*. The statute makes it a crime to "endeavor" to obstruct justice; it does not require that the defendant actually obstructed justice. *See Aguilar, 515 U.S. at 601-02* ("*[§ 1503*] makes conduct punishable where the defendant acts with an intent to obstruct justice, and in a manner that is likely to obstruct justice, but is foiled in some way.").

investigation, we conclude that the government sufficiently established that Brenkus "corruptly intended" to impede the due administration of justice under *§ 1503* of the U.S. Federal Code.

2. Jury Instructions

The district court, following the general, "catch-all" Seventh Circuit Pattern Criminal Jury Instruction for obstruction of justice, instructed the jury, in relevant part, that in order to find Brenkus guilty of obstruction of justice under *§ 1503*, they had to find that Brenkus

> endeavored to influence, obstruct, and impede the due administration [**38] of justice by directing and advising Marjan that in response to any inquiries in a federal grand jury investigation . . . Marjan should state that he 'don't know nobody,' and that he 'don't know nothin,' . . . should further respond to any such inquiries by stating, 'I don't know what you're talking about,' [and] should state that he 'didn't try to train nobody.'"

See supra pp. 12-13 (full text of instruction). Brenkus contends that the district court erred in giving this instruction and in refusing his proffered jury instruction on *§ 1503*, which stated that in order to find Brenkus guilty of obstruction of justice the jury had to find that Marjan "was a witness" and that Brenkus "endeavored to influence, intimidate, and impede Joseph Marjan by advising him to lie on account of his being a witness." *See supra* p. 11 n. 10.

A defendant is entitled to an instruction on his theory of the case if the proposed instruction meets the following criteria: (1) it is an accurate statement of the law; (2) it is supported by the evidence; (3) it reflects a theory of the defendant's case which is not already part of the charge; and (4) the failure to include the instruction would deny the defendant a fair trial. *United States v. Boykins, 9 F.3d 1278, 1285 (7th Cir. 1993).* Brenkus's proposed instruction fails the first criteria, that it be an accurate statement of law. The proffered instruction was based on Brenkus's contrived reading of *Aguilar* that draws a line between actual and potential grand jury witnesses. *See Aguilar, 515 U.S. at 600-01.* In Brenkus's view and mischaracterization of the relevant statute and case law, he could not have intended to obstruct justice if Marjan had not been subpoenaed and was not an actual grand jury witness. As previously discussed, that is not the holding of *Aguilar. See id.* Rather, to prove that Brenkus obstructed justice, the government was required to show that Brenkus intended to engage in conduct that would have had the "natural and probable" effect of impeding the administration of the grand jury proceeding. *Id. at 599.* Directing even a potential witness to lie directly to the grand jury could very easily have had the "natural and probable effect" of *intending* to impede the grand jury's proceedings, and the government was only required to show Brenkus's intention. Thus, Brenkus's proposed instruction was not a correct statement of law as applied to this case.

Brenkus next claims that the trial judge erred when she failed *sua sponte* to provide a limiting

instruction when she admitted into evidence Marjan's statement to Brenkus that he heard that "Covelli was involved in the grand jury and Covelli got, you know, he's the second person this month." According to Brenkus, this statement was inadmissible hearsay and thus could not be considered for the truth of the matters asserted (that Covelli was the second person involved in a grand jury investigation in October of 2001). Since Brenkus neither requested a limiting instruction at trial nor timely and properly objected in any way to the admission of Marjan's statement, he has waived any argument on this issue absent a showing of plain error. *See United States v. Martinez, 939 F.2d 412, 414 (1991).* Plain error exists only when there has been (1) an error, (2) that is plain, and (3) that affects substantial rights. *Johnson v. United States, 520 U.S. 461, 466-67, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997).* "If all three conditions are met, [this court] may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id. at 467* (citations and quotations omitted).

It is well-settled that statements that are offered for context, and not for the truth of the matter asserted, are not hearsay as defined in *Rule 801 of the Federal Rules of Evidence. See United States v. Gajo, 290 F.3d 922, 930 (7th Cir. 2002).* Marjan's statement to Brenkus that "Covelli was involved in the grand jury and . . . you know, he's the second person this month" was offered to provide the context for Brenkus's instructions to Marjan that he should lie to law enforcement. *See Gajo, 290 F.3d at*

930. Without Marjan's statement, Brenkus's response--"you don't know nothing," and "just play stupid"--would not have made any sense. Moreover, we have previously held that "[t]he failure of the trial court to give limiting instructions on the use of hearsay statements at the time of their admission does not constitute plain error mandating reversal." *U.S. v. Fleming, 594 F.2d 598, 606 (7th Cir. 1979).* We find nothing in this record to cause us to depart from this rationale and thus we conclude that the district court did not err when it failed *sua sponte* to provide limiting instructions.

Moreover, even if we were to assume *arguendo* that the district court's failure to give limiting instructions was in error, the error still would not have affected Brenkus's substantial rights. As previously discussed, there is more than sufficient evidence in the record, apart from Marjan's statement, to support the jury's conclusion that a grand jury investigation was underway at the time Brenkus made his incriminating statements to Marjan. Accordingly, we reject Brenkus's contention that the district court committed plain error when it failed to provide a limiting instruction.

B. Defendant Macari

On February 9, 2004, Macari pled guilty to one count of conspiracy to travel interstate to promote arson in violation of *18 U.S.C. § 371* (Count 2) and one count of aiding and abetting travel in interstate commerce to promote arson in violation of *18 U.S.C. § 1952(a)(3)* (Count 13). On April 23, 2004, the district court sentenced Macari to a prison term of

thirty-six months on Count 2, to be served concurrently with his ten-year Illinois state prison sentence for the attempted murder of Leyland, and a term of ten months on Count 13, to be served consecutive to the state sentence. Macari challenges his ten-month consecutive sentence, arguing that the district court abused its discretion by failing to make clear the rationale under which it imposed the consecutive sentence, and thus that portion of his sentence should be reversed.

Since Macari failed to raise a *Booker* issue before the district court, our review is for plain error only. *See United States v. Paladino, 401 F.3d 471, 481 (7th Cir. 2005).* As this court has held in numerous cases, the pre-*Booker* mandatory application of the Sentencing Guidelines *ipso facto* constitutes plain error. *See United States v. White, 406 F.3d 827, 835 (7th Cir. 2005); United States v. Castillo, 406 F.3d 806, 823-24 (7th Cir. 2005).* On this record, we cannot ascertain or say with any exacting degree of certainty whether the sentencing judge would have imposed the same term of incarceration for Macari had she known that the Sentencing Guidelines were not mandatory at the time. Accordingly, we order a limited remand in this case, while retaining jurisdiction, for proceedings consistent with this court's decision in *Paladino. 401 F.3d at 483-84.*

III. Conclusion

We AFFIRM Brenkus's conviction and sentence but order a LIMITED REMAND of Macari's sentence in accordance with the procedures set forth in *Paladino.*

AO 245 B (Rev. 12/03) Judgment in Criminal Case Sheet 1

UNITED STATES DISTRICT COURT

Northern District of Illinois, Eastern Division

UNITED STATES OF AMERICA
V.
ALBIN BRENKUS

JUDGMENT IN A CRIMINAL CASE

Case Number: 03 CR 1061-1

USM Number: 16509-424

Douglas Whitney
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

■ was found guilty on count(s) fourteen (14)
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. §1503(a)	Obstruction of justice	October 2001	fourteen (14)

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

■ The defendant has been found not guilty on count(s) one (1) through thirteen (13)

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing

address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

May 3,2004
Date of Imposition of Judgment

/s/ Suzanne B. Conlon

Suzanne B. Conlon. United States District Judge
Name and Title of Judge

May 3,2004
Date

AO 245 B (Rev. 12/03) Judgment in Criminal Case
Sheet 2 – Imprisonment

DEFENDANT: ALBIN BRENKUS
CASE NUMBER: 03 CR 1061-1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

seventy-eight (78) months

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

■ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

■ before 2 p.m. on June 14, 2004.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

BY _____
DEPUTY UNITED STATES MARSHAL

AO 245 B (Rev. 12/03) Judgment in Criminal Case
Sheet 3 – Supervised Release

DEFENDANT: ALBIN BRENKUS
CASE NUMBER: 03 CR 1061-1

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

three (3) years

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☐ The defendant shall not possess a firearm, destructive device, or any other dangerous weapon. (Check, if applicable.)

☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheets of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and

complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

(10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

(11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

(12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

(13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

AO 245 B (Rev. 12/03) Judgment in Criminal Case
Sheet 5 – Criminal Monetary Penalties

DEFENDANT: ALBIN BRENKUS
CASE NUMBER: 03 CR 1061-1

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6

	Assessment	Fine	Restitution
TOTALS	$ 100.00	$100,000.00	$NA

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentate

TOTALS $ _____ $ _____

☐ Restitution amount ordered pursuant to plea agreement $_____ .

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245 B (Rev. 12/03) Judgment in Criminal Case
Sheet 6 – Schedule of Payments

DEFENDANT: ALBIN BRENKUS
CASE NUMBER: 03 CR 1061-1

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ■ Lump sum payment of $100,100.00 due immediately, balance due

☐ not later than _____, or

☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $_____ over a period over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $_____ over a period of _____ (e.g., months or years), to commence _____

(e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through Federal Bureau of Prisons' inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

AO 245 B (Rev. 12/03) Judgment in Criminal Case Attachment (Page 1) – Statement of Reasons

DEFENDANT: ALBIN BRENKUS
CASE NUMBER: 03 CR 1061-1
DISTRICT: Northern District of Illinois, Eastern Division

STATEMENT OF REASONS
(Not for Public Disclosure)

☐ **THE COURT ADOPTS THE PRESENTENCE REPORT AND GUIDELINE APPLICATIONS WITHOUT CHANGE.**

OR

■ **THE COURT ADOPTS THE PRESENTENCE REPORT AND GUIDELINE APPLICATIONS BUT WITH THESE CHANGES:** (Use Page 3, if necessary.)

☐ **Chapter Two of the U.S.S.G. Manual** determinations by court (including changes to base offense level or specific offense characteristics):

■ **Chapter Three of the U.S.S.G. Manual** adjustment determinations by court (including changes to victim-related adjustments, role in the offense, obstruction of justice, multiple counts, or acceptance of responsibility):

☐ **Chapter Four of the U.S.S.G. Manual** determinations by court (including changes to criminal history category or scores, career offender, or criminal livelihood determinations):

☐ **THE COURT ADOPTS THE PRESENTENCE REPORT WITH THESE COMMENTS OR FINDINGS** (including comments or factual findings concerning certain information in the presentence report that the Federal Bureau of Prisons may rely on when it makes inmate classification, designation, or programming decisions. Specify court comments or findings, including paragraphs in the presentence report.) (Use Page 3, if necessary.)

GUIDELINE RANGE DETERMINED BY THE COURT (BEFORE DEPARTURES):

Total Offense Level: twenty-six (26)

Criminal History Category ___I___

Imprisonment Range: sixty-three (63) to seventy-eight (78) months

Supervised Release Range: two (2) to three (3) Years

Fine Range: $ 12,500.00 to $ 125,000.00

☐ Fine waived or below the guideline range because of inability to pay.

■ **THE SENTENCE IS WITHIN THE GUIDELINE RANGE, THAT RANGE DOES NOT EXCEED 24 MONTHS, AND THE COURT FINDS NO REASON TO DEPART.**

OR

☐ **THE SENTENCE IS WITHIN A GUIDELINE RANGE, THAT RANGE EXCEEDS 24 MONTHS, AND THE SPECIFIC SENTENCE IS IMPOSED FOR THESE REASONS:** (Use Page 3, if necessary.)

AO 245 B (Rev. 12/03) Judgment in Criminal Case
Attachment (Page 2) – Statement of Reasons

DEFENDANT: ALBIN BRENKUS
CASE NUMBER: 03 CR 1061-1
DISTRICT: Northern District of Illinois, Eastern Division

STATEMENT OF REASONS
(Not for Public Disclosure)

RESTITUTION DETERMINATIONS

Total Amount of Restitution: $ NA

☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because the number of identifiable victim is so large as to make restitution impracticable under 18 U.S.C. § 3663A(c)(3)(A).

☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because the determining complex issues of fact and relating them to the cause or amount of the victims' losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim would be outweighed by the burden on the sentencing process under 18 U.S.C. § 3663A(c)(3)(B).

☐ For other offenses for which restitution is authorized under 18 U.S.C. § 3663 and/or

required by the sentencing guidelines, restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweigh the need to provide rrestitution to any victims under 18 U.S.C. § 3663A(a)(1)(B)(ii).

☐ Restitution is not ordered for other reasons:

☐ Partial restitution is ordered under 18 U.S.C. § 3663(c) for these reasons:

DEPARTURE (Check all that apply)

☐ The sentence departs below the guideline range for the following reasons; or

☐ The sentence departs above the guideline range for the following reasons:

Pursuant to a Plea Agreement

☐ based on 5K1.1 motion of the government based on the defendant's substantial assistance;

☐ based on a government motion pursuant to an early disposition program;

☐ based on a binding plea agreement for departure which the court has accepted (cite below reason, if applicable);

☐ based on a plea agreement which cites the below reason for departure, which the court finds to be justified; or

☐ based on a plea agreement which states that the government will not oppose a defense departure motion and cites the below reason.

Pursuant to a Motion Not Addressed in a Plea Agreement.

☐ pursuant to a 5K1.1 motion of the government based on the defendant's substantial assistance;

☐ pursuant to a government motion based on the below reason for departure; or

☐ pursuant to a defense motion based on the below reason for departure to which the government has not objected; or

☐ pursuant to a defense motion based on the below reason for departure to which the government has objected.

☐ Other than plea agreement or motion by the parties based on the below reason for departure.

Reason(s) for Departure

☐ 4A1.3 Criminal History Adequacy (explain)	☐ 5K2.8 Extreme Conduct	☐ 5K2.16 Voluntary Disclosure of Offense
☐ 5K2.0 Aggravating or Mitigating Circumstances (explain):	☐ 5K2.9 Criminal Purpose	☐ 5K2.17 High-Capacity Semiautomatic Firearm
☐ 5K2.1 Death	☐ 5K2.10 Victim's Conduct	☐ 5K2.18 Violent Street Gang
☐ 5K2.2 Physical Injury	☐ 5K2.11 Lesser Harm	☐ 5K2.20 Aberrant Behavior
☐ 5K2.3 Extreme Psychological Injury	☐ 5K2.12 Coercion and Duress	☐ 5K2.21 Dismissed and Uncharged Conduct
☐ 5K2.4 Abduction or Unlawful Restraint	☐ 5K2.13 Diminished Capacity	☐ 5K2.22 Age or Health of Sex Offenders

- ☐ 5K2.5 Property Damage or Loss
- ☐ 5K2.14 Public Welfare
- ☐ 5K2.23 Discharged Terms of Imprisonment
- ☐ 5K2.6 Weapons and Dangerous Instruments
- ☐ 5K3.1 Early Disposition, "fast-track" Program
- ☐ 5K2.7 Disruption of Government Function
- ☐ Other (e.g., 2B1.1 commentary, 5H1.1-5H1.6 or 5H1.11) (explain and state guideline and/or statutory basis). (Use Page 3, if necessary.)

AO 245 B (Rev. 12/03) Judgment in Criminal Case
Attachment (Page 3) – Statement of Reasons

DEFENDANT: ALBIN BRENKUS
CASE NUMBER: 03 CR 1061-1
DISTRICT: Northern District of Illinois, Eastern Division

STATEMENT OF REASONS
(Not for Public Disclosure)

ADDITIONAL PRESENTENCE REPORT AND GUIDELINE APPLICATION CHANGES
(If necessary.)

SPECIFIC SENTENCE IS IMPOSED FOR THESE REASONS
(If necessary.)

ADDITIONAL COMMENTS OR FINDINGS CONCERNING INFORMATION IN PRESENTENCE REPORT
(If necessary.)

ADDITIONAL REASONS FOR DEPARTING FROM THE GUIDELINE RANGE
(If necessary.)

Defendant's Soc. Sec. No.:	332-36-3992	May 3, 2004 Date of Imposition of Judgment
Defendant's Date of Birth:	July 30, 1943	/s/ Suzanne B. Conlon Signature of Judge
Defendant's Residence Address:	308 Hiddenbrook Lane Willowbrook, Illinois 60527	Suzanne B. Conlon, United States District Judge Name and Title of Judge
		May 3, 2004 Date Signed
Defendant's Mailing Address:	Same as above	

Minute Order Form (06/97)

United States of District Court,
Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Suzanne B. Conlon	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	03 CR 1061 – 1	**DATE**	3/29/2004
CASE TITLE	UNITED STATES vs. ALBIN C. BRENKUS		

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

MOTION

DOCKET ENTRY

(1)	☐	Filed motion of [use listing in "Motion" box above.]
(2)	☐	Brief in support of motion due _____.
(3)	☐	Answer brief to motion due _____.

Reply to answer brief due _____.

(4) ☐ Ruling/Hearing on _____ set for _____ at _____.

(5) ☐ Status hearing [held/continued to] [set for/re-set for] on _____ set for _____ at _____.

(6) ☐ Pretrial conference [held/continued to] [set for/re-set for] on _____ set for _____ at _____.

(7) ☐ Trial [set for/re-set for] on _____ at _____.

(8) ☐ [Bench/Jury trial] [Hearing] held/continued to _____ at _____.

(9) ☐ This case is dismissed [without/without] prejudice and without costs [by/agreement/pursuant to]
☐ FRCP4(m) ☐ Local Rule 41.1
☐ FRCP41(a)(1) ☐ FRCP41(a)(2)

(10) ■ [Other docket entry] Defendant's motion for judgment of acquittal on Count XIV is denied. The record amply reflects sufficient evidence to support a jury finding beyond a reasonable doubt that defendant was aware of the continuing grand jury investigation of Local 110, that he was aware the FBI was assisting the grand jury by serving subpoenas and questioning witnesses, and that defendant endeavored to obstruct the grand jury investigation by advising a

potential witness to conceal incriminating information.

/s/ Suzanne B. Conlon

(11) ☐ [For further detail see order (on reverse side of/attached to) the original minute order.]

	No notices required, advised in open court.		number of notices	Doc. No. 175
	No notices required.		March 30 2004 date docketed	
✓	Notices mailed by judge's staff.		/s/ deputy initial	
	Notified counsel by telephone.		3/29/2004 date mailed notice	
	Mail AO 450 form.		PW mailing deputy initials	

	Copy to judge/magistrate judge.		2004 March 29 p.m. 12:32 Clerk US District Court		
CB		courtroom deputy's initials	Date/time received in central Clerk's Office		

18 USCS § 1503

§ 1503. Influencing or injuring officer or juror generally

(a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b). If the offense under this section occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(b) The punishment for an offense under this section is--

(1) in the case of a killing, the punishment provided in sections 1111 and 1112 [18 USCS § 1111 and 1112];

(2) in the case of an attempted killing, or a case in which the offense was committed against a petit juror and in which a class A or B felony was charged, imprisonment for not more than 20 years, a fine under this title, or both; and

(3) in any other case, imprisonment for not more than 10 years, a fine under this title, or both.